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FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	MM Docket No. 91-58
)	
Amendment of Section 73.202(b))	RM-7419
Table of Allotments)	
FM Broadcast Stations)	RM-7797
(Caldwell, Texas, et al))	RM-7798

To: The Commission

**REPLY COMMENTS IN RESPONSE TO
JUDICIAL REMAND**

On April 9, 1999, the Commission released a letter in this proceeding inviting final Comments and Reply Comments on April 29, 1999 and May 14, 1999, respectively.

On April 29, Comments were filed by Roy E. Henderson ("Henderson") and served upon the other parties in the proceeding as required. Henderson subsequently received service of Comments of KRTS, Inc., not a direct party to the proceeding but an interested party since the refusal of Bryan Broadcasting License Subsidiary, Inc., ("Bryan") to vacate channel 221A in College Station has in turn blocked KRTS from implementing its own upgrade.

No Comments were received from Bryan and it is assumed none were served. To the extent that Bryan may have filed any Comments with the Commission but not served such Comments upon Henderson, the other party in this case, as required by FCC Rule 1.420, and by the explicit requirement of the Commission as set forth in paragraph 5 of its letter requesting Comments, we would submit

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that any such Comments are fatally defective and not receivable nor recognizable for any purpose in this proceeding and that any such patently defective filing should be rejected accordingly.

DuShore, Pa, 5 FCC Rcd 2022 (1990).

I. COMMENTS FILED BY KRTS

As to the one set of Comments that was received, those filed by KRTS, we are sympathetic to their position but suggest that the blame for their obstruction lies squarely with Bryan which has refused since 1990 to construct an upgrade requested and granted to it in Docket 88-48, while it proceeded on its true goal of taking channel 236 from Caldwell for its use in a second upgrade for its station KTSR in College Station. We would also note that the fact that they did not proceed on construction of the upgrade on 297C3 (and thereby vacating 221A as required for implementation of the KRTS upgrade) should not have been a great surprise since Bryan admitted as much in Comments filed in this very proceeding on October 20, 1994. In that pleading Bryan casually admitted that

"[it] agreed to a settlement [in which it received a cash payment in docket 88-48] which would guarantee that it would receive at least a class C3 facility. The licensee knew that an upgrade on channel 235 was still available. (emphasis supplied)

Only available by seeking through another rulemaking to take it from Henderson in Caldwell, a predictably time consuming effort no matter what the final result, during which it seems clear that Bryan had no intention of building 297C3 or vacating 221A. This

has caused a burden to licensees such as KRTS but it should have no misconceptions as to where the fault lies for that burden. 1/ In any event, Henderson has no disagreement with KRTS's plea for speedy action by the Commission in resolution of this case and joins in that request.

II. FURTHER ACTIONS TAKEN BY BRYAN SUBSEQUENT TO THE COMMENT DATE

Although no Comments were served by Bryan on Henderson, it was active in other ways trying to change the facts of its case as remanded by the Court and as before the Commission. Specifically, as we suspected it would do, (See Henderson Comments at 16-18) Bryan has recognized the hopelessness of its position as it was finally forced to reveal it in its "Amendment" of July 15, 1997, and has now filed yet another application (FCC Public Notice Report No. 24481, May 6, 1999) seeking to again change its proposal to 'make it right' again, seeking to return again to a new tower, at a new site, fully compliant with 73.315(a), which is the same type of proposal made and quickly abandoned in January 1997 as a matter of just so much "confusion".

As indicated in our Comments, we consider the actions of Bryan in this proceeding, as now revealed, to be a patent abuse

1/ Henderson actually filed Comments in support of the allocation of 297C3 to Bryan in Docket 88-48, and when Henderson filed his Reconsideration and Application for Review of that Decision, it was limited to Henderson's request for action on his proposal and did not oppose the allocation of 297C3 to Bryan at all.

of process, founded upon a continuing lack of candor as well as outright deceptions, with this most recent application as simply the last of several disingenuous acts defining a pattern of abuse of the Commission's processes. As such we have filed this same date with the Mass Media Bureau, an Informal Objection alleging such abuse of process, and requesting that this most recent application by Bryan be denied or dismissed, or alternatively, designated for evidentiary hearing. A full copy of the Informal Objection is attached hereto and incorporated herein by reference.

At this point we would submit that notwithstanding what action the Mass Media Bureau might take upon the Bryan application, that the Commission should not recognize that application or its proposed factual changes for any purposes in its decision of this case. The Commission should treat it in this "comparative rulemaking case" (Commission Decision, 13 FCC Rcd 13772 (1998) at pa. 12) the same way, and for the same sound and logical reasons, as it would treat such a proposed 11th hour comparative upgrade in a comparative hearing case. Amendments filed after the proceeding was set for determination (usually after being designated for hearing) were allowed only when necessary but were never recognized to allow a comparative upgrade of that applicant's case as then before the Commission.

Even then, in order to amend at all, the applicant had to show compliance with several factors, including the following:

1. that it acted with due diligence;

2. that its proposed amendment was not required by the voluntary act of the applicant;

3. that the proposed amendment would not disrupt the orderly conduct of the determination of the case

4. that the other parties will not be unfairly prejudiced;

5. that the applicant will not gain a comparative advantage.

(Erwin O'Connor Broadcasting Company, 22 FCC 2d 140 (1970))

Consideration of Bryan's actions here establish that it fails to meet even a single element of that test.

The purpose and need for such an analyses and threshold test was obvious in any comparative proceeding and no less obvious here. The question of city-grade coverage has been of paramount importance in this case since the first Decision in 1995. Bryan not only knew that, it raised the issue itself against Henderson in this case. It cannot now claim ignorance of the relevance and importance of the issue in this case. When it filed its form 301 in January of 1997 claiming proposed construction of a new tower, fully compliant with the city grade coverage requirements of 73.315(a), had that been a bona-fide representation, that would have stood in this case as Bryan's position. That would have been that. It obviously was not.

The reality however, was that the application and its representations were not bona-fide, were in fact a sham that Bryan quickly abandoned (and never explained) upon the first question by the Commission. Not defended, not repaired, but

quickly abandoned in favor of its real, non-compliant, proposal as contained in its amendment of July 15, 1997, and as described in Henderson's Second Supplement. At that time it simply claimed that the new fully compliant tower was a "confusion" and in its 'definitive' amendment filed on July 15, 1997, it revealed its real, honest and truly, proposal, locating at a different site that failed to meet the city grade coverage requirements of 73.315(a) by 8.4% area and 4,135 persons.

It boldly suggested at that time that this deficiency was of no importance now since it was before the Mass Media Bureau which applied a more liberal interpretation of 73.315(a), accepting as little as 80% coverage as "full compliance". In other words, Bryan believed it had "gotten away" with its long subterfuge. It had won the case on a comparative analyses of 73.315(a) that was based upon the Commission's mistaken belief that Bryan would be fully compliant with 73.315(a) and Bryan concealed its true proposal until the last possible moment when it was finally forced to disclose it in its application before the Mass Media Bureau.

The Mass Media Bureau issued a construction permit to Bryan in March of 1998 on the basis of its "true plan" and Bryan's non-compliant proposal has remained the same for almost two years as the case left the FCC and was taken up by the Court of Appeals. It is only after the Commission recognized the relevance of Bryan's non-compliance with 73.315(a) in seeking remand of the case back from the Court that Bryan has been motivated to now

seek to make yet another change, back to the new fully compliant tower approach that was abandoned as so much "confusion" in July of 1997. The motivation for this last minute maneuver is as transparent as it is objectionable. Bryan now realizes that its "true" proposal is far more deficient under 73.315(a) than Henderson's, and that a preference on that point was the only basis for its inferior proposal to be selected over Henderson's. Clearly, with that recognition, its only hope now would be to return to subterfuge 101, to abandon its true plan and, for purposes of prevailing in this case, suggest a return to a new tower at a site in full compliance with 73.315(a). Forget about the earlier "confusion".

Bryan's proposal at this stage of the proceeding, to seek to change the facts of its proposal after remand of the case back from the Court, to avoid the predictable results of that remand, is truly astounding but, for Bryan, not surprising. If Bryan really had a "need" to change its site from the site indicated in its amendment of July 15, 1997, waiting two years to do so is not due diligence; if it had any real concern with its city grade coverage compliance, that problem was clearly "foreseeable" for the same two year period and any change for that purpose should have been filed years ago; to file for the change now is obviously no more than the voluntary act of Bryan, for purely comparative purposes, itself objectionable and unacceptable at this late stage of the proceedings; recognition of the proposed change at this late stage of proceedings subsequent to judicial remand would, without a doubt, result in disruption of the

orderly determination of the case; and recognition of such a late change of facts would clearly unfairly prejudice Henderson. See Nugget Broadcasting Co, 74 RR 2d 221 (1993), no comparative preference recognizable on late amendment; Cuban-American Ltd, 67 RR 2d 1438 (1990), Amendment denied that was foreseeable and lacked diligence; and National Communications Industries, 69 RR 2d 51 (1991), an 8 month delay in proposing a new site does not meet due diligence test.

Lastly, as to prejudice to other parties, there is, of course, one additional factor here unique to this case. Bryan filed its original 301 in January of 1997, proposing construction of a new tower at a site fully compliant with 73.315(a). After the specifics of that proposal were questioned by the Commission, Bryan quickly abandoned it by Amendment filed July 15, 1997, proposing an existing tower at a site that did not meet the requirements of 73.315(a). Henderson filed his Second Supplement addressing the deficiencies of Bryan's second site on September 29, 1997, with a Reply pleading further directed to problems with that second site on October 24, 1997. Evidence of Bryan's selected site, non-compliant with 73.315(a), was before the Commission for ten months before the Commission issued its Decision in the case on July 22, 1998. Also, during that ten month period, Bryan made no effort to change that site and accepted the fact that that was its selected site, that was its proposal before the FCC for its Decision.

As it now turns out, the Commission admits that although those facts were clearly and properly before the Commission for consideration in its July 22, 1998 Decision, it, for some reason, simply did not consider them, this omission being the very basis and purpose of the remand back from the Court. That being the case, it is essential that the Commission consider the case now upon the facts as were properly before it at that time. Clearly, to allow Bryan to now seek to again manipulate the facts and change its proposal subsequent to the remand, to seek some new comparative advantage, would be to compound the prejudice of the original error and further penalize Henderson for the Commission's mistake. Such a result would be inequitable and unjust on its face and the clear prejudice to Henderson could not be justified on any basis.

III. CONCLUSION

Whatever action the Mass Media Bureau may or may not take upon the application filed by Bryan on April 19, 1999, for purposes of this case and this decision in this comparative rulemaking proceeding, such a proposed change may not be recognized for any purpose, and the Decision should be made upon the facts as they existed upon the Commission's prior Decision of July 22, 1998, as also consistent with March 8, 1999, the date of the remand by the U. S. Court of Appeals.

Wherefore, we submit that the Commission should proceed to issue a new Decision in this case, based upon full consideration of the facts as they existed at the time of its last such

decision, and that based upon those facts, the Henderson proposal should be adopted and the Bryan proposal denied.

Respectfully Submitted,

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by


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May 14, 1999

Attachment to Reply Comments
of Roy E. Henderson
FM Docket 91-58
May 14, 1999

Informal Objection
And Motion To Deny Application or
Designate Application For Evidentiary Hearing

Filed: May 14, 1999

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of:

Application of)	
Bryan Broadcasting License Subsidiary)	
To Modify Construction Permit of)	BMPH-990419IB
KTSR(FM), College Station, Texas,)	
to Change channel from 221A and)	
297C3 (Unbuilt C.P.) to 236C2 and to change)	
Transmitter Site and Parameters)	

To: Chief, Mass Media Bureau
Audio Services Division

**INFORMAL OBJECTION AND
MOTION TO DENY APPLICATION OR
DESIGNATE APPLICATION FOR EVIDENTIARY HEARING**

Respectfully Submitted,

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May 14th, 1999

S U M M A R Y

Bryan Broadcast License Subsidiary ("Bryan") is the licensee of KTSR(FM) in College Station, Texas. In Docket 88-48 it requested an upgrade on channel 297C3 which was granted in 1990. Without building that upgrade, Bryan then in May of 1991 filed a counterproposal in Docket 91-58 for a second upgrade, to take channel 236 from Caldwell, Texas, in conflict with a request by Roy E. Henderson, ("Henderson") permittee of KLTR(FM) on channel 236A in Caldwell, to upgrade that station from an A to a C2.

In the course of that proceeding, Bryan claimed non-compliance of Henderson with the city grade coverage requirements of 73.315(a) and on that basis, a belief by the Commission that Henderson would suffer a de minimis deficiency under that rule but that Bryan would fully meet the rule, Bryan's proposal was adopted and Henderson's denied. During all that time and for years thereafter Bryan concealed its true plan to construct its upgraded station at a location that itself suffered serious deficiency under rule 73.315(a), the recognition of which would undoubtedly reverse the decision that had been rendered in its favor. It delayed filing an application form 301 for over one year after being required to do so and when finally filed, the application which alleged construction of a new tower in full compliance with all rules, was found to have included a basic deception and misrepresentation as to notification of tower construction to the FAA.

When the lack of any evidence of proposed tower construction was raised by the FCC staff, Bryan quickly claimed that the whole application was a result of "confusion" and amended to a totally different existing site that suffered a substantial deficiency under rule 73.315(a). Henderson filed a "Second Supplement" with the Commission noting the deficient site and also the serious and unexplained irregularities that surrounded the filings, but the FCC issued a final Decision in the case in July of 1998, taking no note of those matters. Henderson filed an appeal of the Decision to the U.S. Court of Appeals which granted a Commission request for remand in March of 1999, based upon the Commission's recognition of the relevance of the matters raised in the Second Supplement and the fact that the Commission had not considered them in its decision.

Approximately 5 weeks after the Court remand, Bryan filed its most recent application (on April 19, 1999) seeking to again go back to its new tower approach at a site that would fully meet the requirements of rule 73.315(a). Henderson argues here that the evidence of this case clearly defines a pattern first of "lack of candor" by Bryan in failing to disclose its true intentions and failure to fully comply with 73.315(a), and then, in filing its "new tower" proposal on January 21, 1997,

participating in a deliberate and as yet unexplained deception upon the Commission, always and consistently for the same purpose of concealing its true intentions in construction of the requested upgrade. The deficiencies in conduct as set forth herein do not appear to be in any way innocent or inconsequential and the motive for the passive and deliberate deceptions are always obvious and always the same, to hide its true plans in constructing the station and its failure to meet the requirements of 73.315(a).

It is submitted that the most recent application by Bryan is just the most recent of disingenuous actions by Bryan in this matter, an 11th hour attempt to "change back" to full rule compliance to avoid the natural consequences of the Court's remand. As such, it is submitted that Bryan has abused the Commission's processes repeatedly for its own purposes in concealing its true plans in building the upgraded station. Henderson argues that recognition of the pattern of deception by Bryan requires that the pending application to modify facilities to go to a new site should be found not in the public interest, dismissed, denied, or designated for hearing.

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To: Chief, Mass Media Bureau
Audio Services Division

**INFORMAL OBJECTION AND
MOTION TO DENY APPLICATION OR
DESIGNATE APPLICATION FOR EVIDENTIARY HEARING**

The instant pleading is being filed on behalf of Roy E. Henderson ("Henderson") and is directed against an application for modification of permit filed by Bryan Broadcasting License Subsidiary, Inc. ("Bryan") on April 19, 1999. It is alleged herein that the evidence now available before the FCC in FM Docket 91-58, along with the remand by the U.S. Court of Appeals for the District of Columbia Circuit of the Commission's Decision in that case, and the record of filings by Bryan at the Mass Media Bureau, most notably the three most recent, are more than sufficient to establish a prima facie case that Bryan has seriously abused the Commission's processes, filing applications that were disingenuous, not bona-fide, filed for tactical reasons only, and that such filings also reflected not only a continuing lack of candor but also outright deception.

For the reasons stated below, it is submitted that the most recent application filed by Bryan, its request to modify its permit to move to a new site location, should be dismissed or denied, or if not dismissed or denied outright, that the application be designated for hearing. In support whereof, the following is submitted:

I. BACKGROUND

This case has a very long history before the Commission, a short version of which is necessary here to provide the essential background for the complaint. Henderson is the permittee of KLTR(FM) on channel 236A in Caldwell, Texas, and Bryan is licensee of KTSR(FM) on Channel 221A in College Station. 1/ The facilities are about 15 miles apart and would be competitors in the same general market. In April of 1988, Henderson filed a request to upgrade his station in Caldwell from 236A to 236C2. Shortly thereafter, Bryan filed a mutually exclusive proposal to take channel 236 from Caldwell and use it to upgrade KTSR in College Station.

Henderson and Bryan traded pleadings in Docket 88-48 for approximately one year until in May of 1989, Bryan accepted payment from other parties in Docket 88-48 in return for which Bryan agreed to represent to the Commission that it was abandoning its quest to take channel 236 from Caldwell, and

1/ The complications begin already here since KTSR has also held a construction permit to upgrade its station on channel 297C3 since November of 1990 but has never done so.

requested instead an upgrade on channel 297C3, thereby removing any conflict from that proceeding. Implicit in that representation was the indication that it was made in good faith and would be implemented. Henderson filed comments in support of the Bryan amendment, and to Henderson's surprise, Bryan filed Comments in Opposition to Henderson. On April 23, 1990, the Commission decided Docket 88-48 granting, inter alia, the upgrade that had been requested by Bryan. Henderson's request was not acted upon and he filed two appeals with the Commission, both of which asked only for action on his case and neither of which opposed the upgrade that had been granted to Bryan. With denial of his appeals by the Commission, Henderson did not file a judicial appeal and allowed the case to become final. Nonetheless, Bryan never proceeded on constructing the upgrade it had requested and had been granted in Docket 88-48. 2/ We would suggest that this very action starts the process by Bryan which, like a paint by numbers picture, has now established a clear pattern of deception and abuse of process which will be further discussed below.

**II. LACK OF CANDOR IN DOCKET 91-58 IN FAILING TO REVEAL
NON-COMPLIANCE WITH FCC RULE SECTION 73.315(A)**

In March of 1991 the Commission issued a new Notice of Proposed Rulemaking in Docket 91-58, proposing to adopt the

2/ This is not surprising since at a later time in a later pleading, Bryan admitted that "[it] agreed to a settlement [in docket 88-48] which would guarantee that it would receive at least a class C3 facility. The Licensee knew that an upgrade on Channel 235 was still available. (emphasis supplied) Bryan Comments on Order to Show Cause in Docket 91-58, October 20, 1994.

upgrade in Caldwell that had been requested by Henderson. Shortly after release of the NPR, Bryan filed a counterproposal resurrecting its earlier proposal that had been "abandoned" in Docket 88-48 and again proposing to take Henderson's channel 236 from Caldwell for its use in a second upgrade (it was still 'holding' the earlier upgrade on 297C3 as requested and granted in Docket 88-48).

As processing of the mutually exclusive proposals in Docket 91-58 progressed, Bryan alleged that the Henderson proposal would not fully comply with the city-grade coverage requirements of FCC Rule 73.315(a) and that, because of this, and despite the clear preference of the Henderson proposal in terms of new areas and populations that would be served 3/ the Commission should adopt the Bryan proposal over the Henderson proposal.

In response to the allegations, Henderson recomputed his coverage using the most current map of Caldwell and found that using the f(50,50) measurements, his city grade signal missed approximately 4% of the area of Caldwell which consisted of an airport runway and industrial strip containing approximately 25 persons. Henderson claimed it was de minimis and subsequently submitted further measurements using Tech Note 101, and also taking account of terrain roughness, that actually indicated full compliance with the coverage rule.

3/ Henderson's proposal would yield a C2 station and a C3 station which would serve 283,100 persons in 11,130 sq. km., while Bryan's proposal would yield only a Class A station and a C2 station which would serve only 262,500 people in 8,880 sq. km..

The Commission in its first Decision (10 FCC Rcd 7285 (1995) and in its later Decision rejecting Reconsideration (11 FCC Rcd 5326 (1996)), adopted the Bryan proposal over the superior Henderson proposal on that very basis that even if Henderson's non-compliance with 73.315(a) was de minimis, it could not be adopted over the proposal of Bryan, which the Commission believed was at all times in full compliance with 73.315(a). There was never any question that this one point was the determining factor in the case, the one and only reason why Bryan's inferior proposal had been selected over Henderson's superior one. 4/ Bryan knew this during all the years and all the decisions, that the Commission believed that Henderson's proposal would fail in some way to fully meet the requirements of 73.315(a) but that the Bryan proposal would meet those requirements in full. Subsequent facts revealed in this case indicate that the Commission has been "had" by Bryan, hoodwinked, that Bryan never had any intention of meeting the requirements of 73.315(a), that it knew that and that it would simply not disclose that fact until the appeals in the case had become final and the case was over. This, in itself, was an appalling lack of candor on the part of Bryan and constitutes the first portion of the overall abuse of process by Bryan in this case.

At this point it is also important to note that since the time this matter started in 1988, through the present time, there

4/ This fact was recognized and stated repeatedly in the Commission's final Decision released July 22, 1998, which denied Henderson's Application for Review. See pg. 13 *infra*.

has been a continuity of ownership and control of KTSR, starting with Hicks Broadcasting in 1988, through a myriad of complex, if barely decipherable, holding companies and subsidiaries through to the present time where it is Bryan Broadcasting License Subsidiary, Inc, which in turn is wholly owned by Bryan Broadcasting License Operating Company, which is then 85% owned and controlled by William R. Hicks, President. The control, the continuing knowledge, has always been the same. This well-experienced licensee has been operating the station in the same community for over ten years and as such must be assumed to know the community well, and must be assumed to know during all that time exactly where it intended to build its upgraded station if the upgrade were granted. It is beyond reason and beyond belief that it could be otherwise.

During all the time this case has been in litigation, for over ten years, Bryan had to have known exactly where it would place this station if granted, and had to have known that the station at that site would not be in compliance with the city grade coverage requirements of 73.315(a). While zealously arguing the importance of that rule against Henderson, it chose to conceal the deficiency in its own plans, knowing that such disclosure would destroy the only basis on which it had prevailed in the FCC decisions, the Commission's mistaken belief all along that the station to be constructed by Bryan would fully meet the requirements of 73.315(a). Such non-disclosure and concealment of a fact known to be not only relevant but dispositive in this case was, in and of itself, a serious and unacceptable lack of candor

by Bryan. But it gets much worse than simply "concealing" and "failing to disclose".

III. THE FILING OF THE SHAM FORM 301 APPLICATION

The Commission's decision of July 5, 1995, which granted the Bryan proposal included a requirement in paragraph 12 that Bryan submit a form 301 application to the Commission within 90 days of the effective date of the Order detailing its proposed station construction. The effective date of the Order was August 21, 1995, but Bryan did not file a form 301 within 90 days of that date. It opted instead to wait while the initial FCC Order was under appeal, undoubtedly well aware that disclosure of its true plans and its non-compliance with 73.315(a) would remove the basis of the decision in its favor, leaving it with no claim to prevail.

In fact, it waited for well over a year without filing a form 301, while Henderson's Petition for Reconsideration was filed and denied, and for seven months after Henderson had filed his Application for Review. Finally, on January 21, 1997, Bryan filed a form 301 application for its new upgraded station describing in great detail the new tower it was going to build at a site in full compliance with all FCC rules. Even at that, the filing of the application must have been a very difficult decision for Bryan since it was executed by both the Licensee and the Technical Director on the same date of October 8, 1996, but then held and not filed with the FCC until January 21, 1997, three and one-half months later. One would think that with over

three months to "think it over" they would have been very sure of what they said and what they proposed.

A. The Second Application Confirming The Representations Submitted that Same Day In The Form 301 Application

In fact, on the very same day of January 21, 1997, Bryan filed a second application, a Form 307 request to extend time on their earlier permit to upgrade on channel 297C3 and in that application, also signed by the Licensee, the Licensee also spoke at great lengths and with great specificity of the Form 301 filed that very same day, of the fact that a new tower would be built for the channel 236C2 upgrade, that Bryan had "located a suitable site to erect the new tower", "has discussed the construction with tower construction companies" and was simultaneously filing the Form 301 application "for a construction permit for those facilities". Bryan made a point however, both in filing the 301 application and in the 307 application that there was an appeal pending and that there was no rush on this, no construction would really start until after the appeals were final, but that it would move "expeditiously" to build that new tower once the appeals were over and the case was final. We soon found out why.

B. The Deliberate Misrepresentation in The Form 301

In its 301 Application Bryan responded to paragraph 5, page 18 of the form, that it had notified the FAA of its planned construction of the new tower, that it had done so on October 6, 1996, and that it had sent that notification to the FAA's Fort Worth Office. A lot of representations there and none of them

true. The response to these questions were not "typographical errors" since they were written in ink (with the balance of the application being typed). The application indicated full compliance with the city grade coverage requirements of 73.315(a) from the designated site and no other waivers were requested. A very clean application from the new tower at the specified site. Unfortunately for Bryan, analyses of its application moved a bit too fast and the charade was uncovered.

By letter of May 29, 1997, the Commission staff contacted Bryan and advised Bryan of its difficulty in finding any record of Bryan's "new tower" anywhere in the FAA file or in the FCC files and requested further information to clarify. It took Bryan 30 days to respond to the FCC letter and on June 30, 1997, counsel for Bryan wrote to the Commission and advised the Commission that there had been "some confusion" on the application and it turns out that the new tower would not really be built, that it turns out that Bryan was actually planning to lease space on an existing tower at a different site, and that an Amendment would be filed in 14 days to straighten everything out. What happened next was, by this time, predictable.

C. The Unexplained "Amendment"

It just so happens that the real proposal would be to locate the new station at a totally different site that just happens to miss city grade coverage by 8.4%. What a revelation. Having finally been flushed out, and finally forced to reveal its true intentions in this case, Bryan suggested that it really didn't

matter anymore since it was now before the Mass Media Bureau and it could miss city grade and compliance with 73.315(a) by as much as 80% and that would still be 'O.K.' They thought they were in free: winning the case on an alleged de minimis miss by Henderson, while concealing its own violation of the same rule for as long as possible, to the point where, when it was finally forced to disclose its own true intentions, it would be too late for anyone to take note of it or do anything about it. The net result would be that Bryan, with a substantially inferior service in terms of area and population that would receive service, 5/ would be preferred over the better service of Henderson because he missed 4% area and 25 people, even though it would later turn out in the same case, applying the same rule, that Bryan missed 8.4 % area and 4,145 people. At this point it seemed clear that Bryan thought it was home free. We don't think so.

D. Henderson's Second Supplement Pleading

On September 29, 1997, Henderson filed a pleading with the Commission called a "Second Supplement to Application for Review" bringing this development to the attention of the Commission. In the pleading Henderson noted, among other things, the total lack of any explanation from Bryan as to how this application as well as a second application also referring to the new tower construction, both signed by the licensee, could have been filed in "confusion". As previously noted, the 301 application had

5/ Henderson's proposal would serve 25,000 people in 2,250 sq. km. beyond what would be provided by the Bryan proposal.

actually been executed over three months before filing and provided an extraordinary time for review before filing and that there was no logical explanation as to how a very experienced broadcaster could have possibly been "confused" between construction of a new tower at a site that met all rules and use of an existing site that did not. There had to be some explanation of this bizarre action but Bryan had pointedly offered none. Henderson also requested that Bryan submit population figures for the missed areas as required by Form 301 and which had also been omitted from the Bryan Amendment.

Bryan filed an Opposition to the Second Supplement that conspicuously omitted any explanation whatsoever as to the filing of the first application, or how it could have been anything but a deliberate deception that had been caught. They chose to say nothing, and offered no explanation at all. They offered no population figures and no explanation of anything, their argument being confined to essentially the point that everyone was too late, their proposal must now be considered under the 80% compliance rule so an 8.4% area and 4,145 person deficiency would be acceptable for them while a 4%, 25 person deficiency by Henderson would be fatal.

In Henderson's Reply to the Opposition, he noted the failure of Bryan to offer any explanation of its actions, and supplied the population figures for Bryan's 8.4% missed area which Bryan had steadfastly refused to do. In addition, and of no small significance, Henderson also filed a Statement from his

Engineering Consultant who had contacted the FAA, Fort Worth office, and had been informed that, contrary to the specific representations in Bryan's form 301 as to the filing of an FAA notification for the new Tower, allegedly filed on 10/6/1996, no such notification had ever been filed on that date or any other date. The representation to the Commission was simply and totally untrue. Not just a "lack of candor" but a deliberately untrue statement on a matter of substantial significance in this case. prior to filing the instant pleading, Henderson sought to update the information on this point and re-contacted the FAA on or about April 28, 1999. The response was the same: contrary to Bryan's representation in its application, no notification of proposed construction was ever sent to the FAA on 10/6/1996, or on any other date, ever. See attached Declaration of Fred W. Hannel.

Approximately six months after filing of the Second Supplement, the Mass Media Bureau granted Bryan's application "as amended" and a construction permit at that site was issued to Bryan on March 20, 1998.

IV. THE COMMISSION'S DECISION AND THE COURT'S REMAND

On July 22, 1998, the Commission issued its final decision in this case upholding the decisions in favor of Bryan (13 FCC Rcd 13772 (1998), again on its misplaced belief that Bryan's station would be in full compliance with 73.315(a) while

Henderson's would not be. It left no question on the basis of its decision:

"...we are reluctant in this comparative rulemaking proceeding involving competing upgrade proposals to prefer an upgrade proposal failing to provide the requisite 70 dbu signal to 100% of its community of license, as Section 73.315(a) requires. We recognize that, where all else is the same, there would appear to be a preference for the proposed upgrade at Caldwell because it would serve an additional 48,755 persons while the upgrade [of Bryan] at College Station will provide service to an additional 22,908 persons. All else is not the same, however, for the College Station upgrade proposal fully satisfies Section 73.315(a) while Henderson's Caldwell proposal does not...Even if we were to characterize the [Henderson] shortfall in principal city coverage to be de minimis, we do not believe that waiver in this situation would be appropriate because it would prejudice a competing proposal [Bryan] in full compliance with Section 73.315(a) of the Rules." Memorandum Opinion and Order 13 FCC Rcd 13772 (1998) at paragraph 12, and at paragraph 18 of the same decision: "Henderson's Caldwell upgrade proposal would have provided service to an additional 48,755 persons. This is a significant public interest benefit. However, this does not support, in any way, a conclusion that the staff had made a finding that the Caldwell upgrade proposal was in compliance with Section 73.315(a) or that the staff would prefer that proposal over the competing [Bryan] College Station proposal that does comply with Section 73.315(a) of the Rules."

In its Decision it made no mention at all of the matters raised in the Second Supplement, and on August 14, 1998, Henderson filed his Notice of Appeal of the Decision with the United States Court of Appeals for the District of Columbia Circuit (case no. 98-1372), and on February 9, 1999, Henderson filed his Brief on Appeal. Shortly thereafter, Counsel for the Commission indicated that it had been determined that somehow the Commission had failed to consider the facts disclosed in the Second Supplement, that those facts were clearly relevant to a

Decision in the case and that the Commission was therefore requesting a remand of the case back to the Commission for further review and Decision. The case was then remanded back to the Commission on March 8, 1999.

Following the remand, the Commission on April 9, 1999, asked the parties to submit any further final Comments on the matter by April 29, 1999, and Henderson did so. By the FCC's Order any such Comments were required to be served on the parties and Henderson's Comments were served upon Bryan as well as others. Conversely, no Comments were received by Henderson from Bryan and it is assumed that none were served. If filed without such service the Comments would be fatally defective and moved to be stricken as such. See also Section 1.420 of the Rules and DuShore Pa, 5 FCC Rcd 2022 (1990),

V. BRYAN'S LATEST PROPOSED CHANGE TO SEEK TO AVOID THE EFFECT OF THE JUDICIAL REMAND

Finally, by Public Notice Report No. 24481 released by the Commission on May 6, 1999, it was disclosed that Bryan has again filed yet another request to move its site, this time again to a new location that would ostensibly meet FCC city coverage rules. This is over one year since Bryan received its construction permit based upon correction of its prior "confusion", approximately 10 months after the final FCC Decision in this case, and 5 weeks after the Court remanded the case back to the Commission based upon the very fact of the site that had been specified by Bryan and granted in its construction permit.

It is more than obvious that this most recent move by Bryan is nothing more than one more last ditch change to try to undo the other changes and apply an 11th hour blowout-patch to its proposal which it knows is presently clearly seen as deficient and inferior in every way, including compliance with the city grade coverage requirements of 73.315(a), to the Henderson proposal. This application is not motivated by any concept of the public interest but is only the last step in a series of manipulative and disingenuous actions taken by Bryan which individually and collectively constitute nothing less than a clear, patent, and continuing abuse of the Commission's processes. Such an approach was flatly rejected by both the Court and the Commission:

We cannot allow [the applicant] to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed. Colorado Radio Corp v. FCC, 118 F.2d 24, 26 (D.C. Cir 1941). See also the Commission's decision in Tidewater Teleradio, Inc. 24 RR 2d 653 (1962): "...Representations made to us...are not to be put forth as part of gamesmanship or for tactical advantage: they must be seriously advanced and seriously regarded in actual operation."

In view of the facts of record in this case, the result should be no different here.

Given the long broadcast experience of Bryan, and more importantly, that long broadcast experience operating KTSR(FM) in College Station, Texas, there can be no doubt that it knew all along where it intended to build the station and that operation from that site did not meet the requirements of 73.315(a); it was

aware of the importance of this fact in this case but concealed its own plans for a matter of years, and over the course of not one but two FCC decisions which relied on the incorrect belief of Bryan's compliance with 73.315(a). It delayed the filing of Form 301 for over a year beyond the time stipulated for that filing, actually executing it in early October of 1996, but then holding the application for an additional three and one-half months beyond that date, hoping, we believe, for a final FCC Decision before filing.

When that was not forthcoming, Bryan filed an application proposing a new tower construction in full compliance with FCC rules. It referred to that very application and to that very proposal in a second application filed on the same day. The filing couldn't possibly have been a 'mistake' or confusion. On the contrary, the evidence establishes the fact that it was a deliberate, well thought-out act. When it filed the application, it included a specific representation that it had notified the FAA of the new tower construction three months earlier, on October 6, 1996. The representation was made deliberately, in ink, and it was not, and could not be, a "Typo". That representation was made for the reliance of the Commission and it was false.

Bryan had not notified the FAA three months earlier; it did not notify the FAA when it filed the FCC application; it **NEVER** notified the FAA of any proposed tower construction. The clear implication of this is that Bryan never planned to build such a

tower but had filed the application only as a temporary cover while the case was on appeal to avoid disclosing its true plans to build the station at an existing site that did not comply with 73.315(a). When the case was final and the grant no longer in jeopardy, the Amendment to the existing non-compliant site could then be filed with no risk, and we assume that was their intent.

When the FCC staff spotted the discrepancies in the original application and asked for further information, Bryan's only response was that there had been some "confusion" in filing the application. It offered no explanation as to how the licensee could have been so "confused" as to mix up the difference between telling the FCC it was going to construct a brand new, fully compliant tower at one site, when what it really 'meant' was that it was going to use an existing different site that was not in compliance with the city coverage rule. Some confusion. Although it was called to their attention, Bryan never offered any explanation as to the filing of the first application or as to the false statement on FAA notification that had been included in that application. We submit that the evidence suggests that the original application filed January 21, 1997, was a sham application, not filed in good faith, and never intended to be fulfilled, whose only purpose was to continue the coverup of Bryan's true intentions in Docket 91-58, hopefully until the decision in that case became final.

**VI. THE PENDING APPLICATION FILED APRIL 19, 1999, TO AGAIN
ATTEMPT TO CHANGE THE FACTS FOR COMPARATIVE PURPOSES.**

After filing its 'Amendment' to the application, the Bureau proceeded to grant a construction permit to Bryan at that site with its admitted shortfall of 8.4% area and 4,145 persons not receiving city grade coverage under Rule 73.315(a). Since Bryan then believed that it was at a point in the proceeding where the relaxed rule of 80% coverage would protect it, it was then content to let it go at that, believing that its manipulative scheme had been successful. It was content then to let this little modification stand as its finally revealed "true intention".

It stood that way for well over one year until the Commission recognized the relevance of Bryan's deficiency as had been documented and submitted by Henderson in his Second Supplement (but then overlooked by the Commission), and recognizing that relevance, asked for the case back from the Court and the Court remanded it to the Commission to fully consider the fact of Bryan's non-compliance with 73.315(a). Seeing that, Bryan once again went into high gear to offer yet another change to frustrate the decision on remand from the Court. On April 19, 1999, it once again proposed moving its site back so it would once again build a new tower at a fully compliant site, a proposal so reminiscent of its original "confusion" proposal of January 21, 1997. What has changed since then? Only issuance of the Court's remand and Bryan's unwelcome

prospect of having its proposal judged for once upon the true and complete facts.

VII. CONCLUSION

We submit that the one and only reason and motivation for this most recent proposed change in transmitter site is that Bryan has finally recognized that it will not get away with its prior charade and that its proposal, as previously presented to the Commission, and before the Commission in deciding the Application for Review, would not survive scrutiny or comparison to Henderson's proposal. So now here it comes again seeking to change things before the FCC finally decides this case, once and for all. That is the one and only purpose of this application and it is an improper one. Needless to say, should it be successful with the change, past experience would predict just one more amendment, to a different non-compliant site, but only after the case has become final.

No one has to wait for that. The track record of Bryan in this case is a sorry one, full of lack of candor, outright deception, and unexplained, unacceptable actions by the licensee. The present application should either be denied or dismissed outright or set for hearing so that Bryan would be required at last to offer whatever explanation it may seek to explain its difficulty in understanding the difference between construction of a compliant new tower at one site, and an existing non-compliant tower at a different site, and what its state of mind was when it filed an application that, by every fact now known,

was simply an outright sham. The fact that any such explanation would be required under oath and subject to cross-examination and the rules of evidence should assure that the truth might finally emerge on this matter.

What we are dealing with here are not innocent minor inconsistencies or errors. What we are dealing with here are substantial and deliberate deviations from the minimal level of candor, truth, and standard of conduct expected of any licensee. Moreover, the motive for concealment and deception is palpable, the effect of not fully meeting the city grade coverage requirements of 73.315(a) with the realization that that was the one and ONLY basis for the prior decisions in its favor. It is all too obvious.

Lack of candor connotes concealment, evasion or other failures to be fully informative. Fox River Broadcasting, Inc., 93 FCC 2d 127 (1983). Misrepresentation connotes a material false statement of fact made with intent to deceive. Fox River Broadcasting, Inc., 88 FCC 2d 1132 (1982). Both involve deceit. In the instant case, Bryan was a very experienced broadcaster, long familiar with the community where it sought to build its upgraded station and well aware of the importance of the city grade coverage analyses to the Commission in this case. Notwithstanding those facts, it concealed its own intentions for years, allowing the Commission to proceed in its Decisions on the false belief that Bryan's proposed station would fully comply with 73.315(a).

When finally required to take an action which would necessarily reveal its true intentions, the filing of FCC Form 301, it delayed for over a year, obviously reluctant to disclose that fact while the case was still not final. Finally, in October of 1996 it prepared an application but again held it for over three months while obviously "thinking it over". Finally when it filed the application on January 21, 1997, it did so with great gusto, not only filing form 301, but filing a second form 307 application on the same day which also referred to the "new tower" to be constructed at the site they had found and by builders they had discussed it with. It was all so specific and all so persuasive...and also so much baloney.

At the first test of its representations in this application, it ran, claiming it had all been so much "confusion". Talk about confusion. That application was signed by the President of Bryant who certified by that signature that

"The applicant acknowledges that all statements made in this application and attached exhibits are considered material representations..., [and that] the applicant represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination of any other application with which it may be in conflict,... [and that] the applicant has a continuing obligation to advise the Commission through amendments, of any substantial and significant changes in information furnished." And how about the representation that the statements in the application are "true and correct... and are made in good faith"?

The application had been signed on 10-8-96 and filed on 1-21-97. The application contained a direct statement as to applicant having notified the FAA at its Fort Worth office on 10-8-96. The statement was untrue when written, it was untrue

when filed, and it remained untrue for over 4 more months until the FCC wrote to Bryan about the lack of any tower information from FAA or FCC. Even then Bryan did not amend the statement and it remained untrue and unexplained then, as it does now.

Every bit of evidence in this case points to the conclusion that Bryan participated in a long coverup, passive at first, just not disclosing the information to the FCC, and then active when it filed a sham application whose only purpose was to continue the charade of their compliance with 73.315(a). As soon as the deception was caught, Bryan simply moved to claim some "confusion" and finally laid its cards on the table with its Amendment that did not propose a new tower compliant with the rules but a totally different plan to use an existing site that did not meet the city coverage rule. According to Bryan when it filed its Amendment, that was now fully acceptable since it had gotten to the end of the case and could now take full advantage of the more liberal application of the rule by the Mass Media Bureau.

The remand from the Court apparently convinced Bryan that there may still be some jeopardy on that so it now seeks to again propose a fully compliant tower. The one and only purpose of this application is to avoid consideration of its proposal as it stood before the Commission on the Application for Review and before the Court on appeal, to do whatever it had to do in order to avoid consideration of that fact situation of record under the Court's remand, and to again seek to manipulate the Commission's

processes to serve its own pleasure. Such actions are prejudicial to Henderson and everyone else involved with this case. They are wasteful of the FCC's and the Court's time, money, and resources, they are disruptive in the extreme to any reasonable judicial determination, See Colorado, supra., and they cannot be tolerated.

The actions by Bryan have not been isolated, nor have they been careless or harmless mistakes. Beyond that, the motivation and intent to deceive is patent. Every move it has made has been to cover up its deficiency under 73.315(a) and that cover-up was essential to Bryan's prevailing in the Commission's analyses in FM Docket 91-58. Filing an application in furtherance of that deception is something substantially more than "careless" and certainly not explained in any way by a claim of "confusion". Improper motives in the filing of applications have been recognized as unacceptable by the Commission before, See Capitol Broadcasting Co, 30 FCC 1 (1961), and should be recognized as such here.

The Commission should not countenance the actions taken by Bryan in this proceeding and certainly should not allow itself to be drawn in as a party to the abusive and unacceptable applications as filed by Bryan. It is always necessary for the Commission to make a positive public interest finding in granting any application, even one for a minor modification of permit as claimed here, and the facts of record establish that this application is based upon an unacceptable manipulation and abuse

of FCC processes, to which the Commission should not be a willing party.

Finally, it is noted that there are many facts discussed in this pleading and the pleading is accompanied by the Declaration of Roy E. Henderson attesting to the accuracy of those facts. In addition, the facts are discussed at further length in pleadings filed in FM Docket 91-58, especially the Second Supplement and Reply to Opposition to Second Supplement, filed September 29, 1997 and October 24, 1997, respectively. We submit that the facts fully support the conclusion that the application filed by Bryan on April 19, 1999, is not in the public interest and should not be granted.

Wherefore Henderson moves that the application for modification of license of the construction permit for channel 236C2 of Bryan Broadcast License Subsidiary is not in the public interest, is in fact part of a continuing pattern of abuse of process by Bryan relative to this permit, and that the application should be denied or dismissed on that basis, or, in the alternative, designated for hearing to fully determine the facts and circumstances of Bryan's actions and the effects of those actions upon Bryan as a Commission licensee.

Respectfully Submitted,

ROY E. HENDERSON

by



Robert J. Buenzle
His Attorney

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May 14th, 1999

DECLARATION

FRED W. HANNEL, under penalty of perjury hereby states and declares the following:

I am a professional engineer with Bachelor's and Master's Degrees, both in Electrical Engineering;

I have appeared numerous times previously before the Federal Communications Commission, and my qualifications are a matter of record there;

That in my role as Engineering counsel and Consultant to applicants for new AM, FM, TV and other broadcast radio services I have had occasion to deal with the Federal Aviation Administration on numerous occasions relative to matters of Antenna structures and clearances. I am familiar with the personnel of that Agency;

That I am Engineering Consultant for Roy E. Henderson applicant for an upgrade of channel 236A to Channel 236C2 an Caldwell, Texas, in Mass Media Docket 91-58;

That on or October 23, 1997, I was asked to check the accuracy of a representation made by Bryan Broadcast License Subsidiary, licensee of KTSR (FM), College Station, Texas, in an Application (FCC Form 301) filed by Bryan on January 21, 1997, which included the specific response and representation to the FCC at paragraph 5, page 18, of the form that "the FAA had been notified of the tower construction specified in that application (to which Bryan answered "yes") and the date of 10/6/96" which Bryan represented to the FCC as the actual date upon which it had made much notification to the FAA at the FAA Fort Worth office. The location of the new tower in that application was given as "30 - 45 - 35 North Latitude and 96 - 27 - 56 West Longitude".

On or about October 23, 1997, I contacted the Fort Worth, Texas, office of the FAA, the office indicated in the Bryan application for its notification, and

spoke with Linda Steele, an Airspace Specialist known to me as an employee of the FAA qualified to respond to the question presented;

That in response to my query as to a notification from Bryan to the FAA as indicated by Bryan in its representations to the FCC in its application of January 21, 1997, I was informed that the FAA had no record whatsoever of such a notification having been filed on the date indicated by Bryan. Further, the FAA has no record of any filing on any other subsequent date, and that there was no such notification filed or received by the FAA for any tower at the location specified in the Bryan Application.

On or about April 28, 1999, I was again asked to update this information and double-check with the FAA to see if any such notification had been filed with the FAA in the intervening months subsequent to my earlier call. I again spoke with Linda Steele, the same Airspace Specialist that initially provided information to me in 1997. She then again re-checked the FAA records and again assured me that no such notification had ever been filed by Bryan or anyone else requesting authority to construct a tower at the co-ordinates listed in the Bryan application of January 21, 1997.

The above statements of fact are true and correct to the best of my own personal knowledge and belief, and I am aware that this Declaration is being submitted to the FCC for its reliance thereon.

Signed and dated this 10th day of May, 1999.

A handwritten signature in cursive script, reading "F. W. Hannel". The signature is written in dark ink and is positioned above a horizontal line.

F. W. Hannel, PE

DECLARATION

ROY E. HENDERSON under penalty of perjury hereby states and declares the following:

I have reviewed the foregoing Informal Objection and the statements of facts and representations contained therein are true and correct to the best of my own personal knowledge and belief.

Signed and dated this 12th day of May, 1999.


Roy E. Henderson

CERTIFICATE OF SERVICE

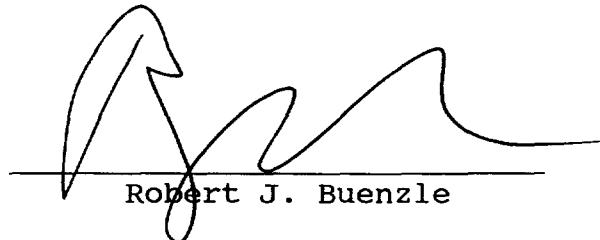
I, Robert J. Buenzle, do hereby certify that copies of the foregoing INFORMAL OBJECTION AND MOTION TO DENY APPLICATION OR DESIGNATE APPLICATION FOR EVIDENTIARY HEARING have been served by United States mail, postage prepaid this 14th day of May, 1999, upon the following:

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Robert J. Buenzle

* Served by Hand

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing REPLY COMMENTS IN RESPONSE TO JUDICIAL REMAND have been served by United States mail, postage prepaid this 14th day of May, 1999, upon the following:

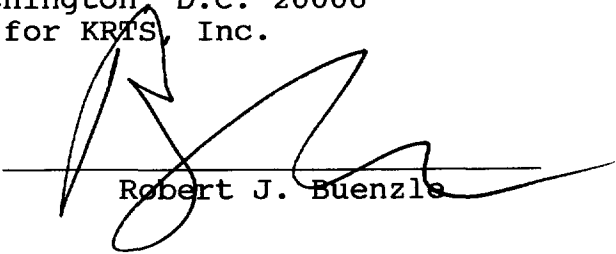
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